

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

EMERGENCY PHYSICIAN SERVICES OF
NEW YORK, ET AL.,

Plaintiffs,

-against-

UNITEDHEALTH GROUP, INC., ET AL.,

Defendants.

Case No. 1:20-cv-09183-JGK

Hon. John G. Koeltl

**DECLARATION OF ETHAN M. SCAPELLATI IN SUPPORT OF DEFENDANTS'
OBJECTIONS TO MAGISTRATE JUDGE NETBURN'S DISCOVERY
RULINGS AND REQUEST TO FILE IMMEDIATE MOTION FOR
SUMMARY JUDGMENT PRIOR TO CLOSE OF DISCOVERY**

In accordance with 28 U.S.C. § 1746, I, Ethan M. Scapellati, declare and state as follows:

1. I am a counsel in the New York office of O'Melveny & Myers LLP.
2. I am admitted to practice in this Court, and I am counsel of record for Defendants¹ in the above-captioned case.
3. I submit this Declaration in support of Defendants' Reply in Support of Defendants' Objections to Magistrate Judge Netburn's Discovery Rulings and Request to File Immediate Motion

¹ Capitalized terms in this Declaration refer to the definitions provided in Defendants' Objections to Magistrate Judge Netburn's Discovery Rulings and Request to File Immediate Motion for Summary Judgment Prior to Close of Discovery (Dkt. No. 164) and the Declaration of Ethan M. Scapellati in support of those Objections (Dkt. No. 165).

for Summary Judgment Prior to Close of Discovery. I have personal knowledge of the matters set forth in this Declaration.

4. In the two matters raised by TeamHealth Plaintiffs in their Opposition that relate to lawsuits filed by TeamHealth Plaintiffs' affiliates against Defendants in Nevada and Pennsylvania. (*see* Opp. at 7), both cases include breach of implied contract and/or RICO conspiracy claims that require proof of subjective intent. *See Fremont Emergency Services (Mandavia) Ltd. v. United Healthcare Insurance Co.*, No. A-19-792978-B, Second Amended Complaint (October 7, 2021); *Emergency Care Services of Pennsylvania, P.C. v. UnitedHealth Group, Inc.*, No. 000598, Second Amended Complaint (June 21, 2022). A true and correct copy of the operative complaints in each matter that reflect these claims are attached as **Exhibit A** and **Exhibit B**, respectively.

5. On May 26 and June 29, 2022, Defendants produced the various benefit calculation methodologies the at-issue health plans selected for calculating the allowed amounts of the Disputed Claims. (*See also* Declaration of Ethan M. Scapellati in Support of Defendants' Objections to Magistrate Judge Netburn's Discovery Rulings and Request to File Immediate Motion for Summary Judgment Prior to Close of Discovery ¶ 5 (Dkt. No. 165).)

6. In addition to the benefit calculation methodologies, on May 26, June 13, June 24, and June 29, 2022, Defendants produced payment amounts and the rate and market information in their possession about the prevailing market price. (*See also id.* ¶¶ 6-7.)

7. Included in Defendants' productions was the employee welfare plan entitled "FedEx Corporation Group Health Plan." A true and correct copy of that plan, produced with beginning bates stamp UHC_SDNY_00029282, is attached hereto as **Exhibit C**. Numerous claims involving the FedEx Corporation Group Health Plan were included on a disputed claims list that TeamHealth Plaintiffs produced to Defendants on November 5, 2021. The member/patient R.S. (date of service: February 24, 2021), at the time he or she received the services described in the Amended Complaint,

was a beneficiary of the “FedEx Corporation Group Health Plan.” That member received services from TeamHealth Plaintiffs in Kenmore Mercy Hospital. TeamHealth Plaintiffs billed the plan \$1,171.00. Defendants adjudicated the claim on behalf of the plan, determining that the allowed amount under plan terms was \$449.70.

8. On July 1, 2022, TeamHealth Plaintiffs served Defendants with their proposed search terms and custodians for Defendants’ ESI. Those proposals included numerous search terms that required Defendants to use the terms “cost” and “margin” and “profit.” A true and correct copy of Defendants’ letter memorializing the agreed-upon search terms is attached hereto as **Exhibit D**.

9. I, along with my colleague Adrian Pollner at O’Melveny, met and conferred with Sarah Dowd (counsel of record for TeamHealth Plaintiffs) on April 13, 2022 and April 26, 2022 regarding the search terms and custodians for Defendants’ ESI. Pursuant to the Court’s July 21, 2022 Order (Dkt. No. 169), the parties agreed on Defendants’ ESI search terms on July 29, 2022. That agreement included the above mentioned search terms requiring Defendants to use the terms “cost” and “margin” and “profit” when searching for responsive documents in their ESI. *See Exhibit D* (Nos. 7, 14, 24). Further, a true and correct copy of the email confirming additional documents, and one additional custodian, that Defendants agreed to search is attached hereto as **Exhibit E**. As both Exhibits make clear, the agreed-upon search terms will require Defendants to review over 175,000 documents across 15 custodians.

10. The large volume of documents resulting from TeamHealth Plaintiffs’ proposed search terms for Defendants’ ESI led Defendants to request a four-month fact discovery extension in their position statement in the parties’ joint status report (Dkt. No. 167), which the Court granted (Dkt. No. 169).

11. On July 13, 2022, TeamHealth Plaintiffs served their Responses and Objections to Defendants’ Second Set of Requests for Production, a true and correct copy of which is attached

hereto as **Exhibit F**. TeamHealth Plaintiffs confirmed that they have no responsive documents from appeal determinations related to at-issue claims (Request No. 2) or from billing Defendants a second time under New York Financial Services Law § 605(a)(1) (Request No. 4).

12. On June 30, 2022, TeamHealth Plaintiffs produced numerous assignment of benefit forms. Included in that production is an example of an assignment of benefit form that TeamHealth Plaintiffs produced as applicable to one or more of the disputed claims in this action that was rendered at the facility Catholic Health System, a true and correct copy of which is attached hereto as **Exhibit G**, produced with beginning bates stamp number PLAINTIFFS002741.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 1st day of August, 2022 in New York, New York

/s/ Ethan M. Scapellati
Ethan M. Scapellati